

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Yoses
F&D

29778

FILE: B-214584

DATE: November 14, 1984

MATTER OF: Fraudulently Received Flight Pay

DIGEST:

An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The de facto rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments.

This decision responds to a request for an advance decision concerning the validity of payments of flight pay and Aviation Career Incentive Pay made to an Army lieutenant colonel, and whether collection action should be taken to recover these payments.^{1/} We find that, in view of the Army's investigation which indicates that the officer fraudulently qualified for both flight training and flight duty, he was not entitled to receive flight pay and Aviation Career Incentive Pay under applicable statutes and regulations. In addition, there is no basis for the extension of the de facto rule to allow the officer to retain the flight pay and Aviation Career Incentive Pay where he fraudulently qualified for such pay. Therefore, collection action should be taken to recover the amount fraudulently received.

FACTS

The Army reports that the officer involved received flight pay and Aviation Career Incentive Pay in the total amount of \$37,304 during the period of May 22, 1969, through November 13, 1982. The Army has found that the officer

^{1/} The request for advance decision was submitted by S. Gast, Finance and Accounting Officer, U.S. Army Aberdeen Proving Ground, Maryland. It was assigned submission number DO-A-1432 by the Department of Defense Military Pay and Allowance Committee.

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fraudulently qualified for this pay in that he had someone other than himself take the initial eye examination to make himself eligible for flight school, and that he falsified Standard Forms 89 and 93 (Report of Medical History), in that he indicated that he did not wear contact lenses or glasses, and concealed his myopia. There is no question, however, that the officer otherwise performed required services as an Army aviator.

As a result of the allegations of fraud, supported by evidence obtained in an investigation of the matter by the Army Criminal Investigation Command, the Army began collection action against the officer for the full amount of flight pay and Aviation Career Incentive Pay he had received. The officer has protested the collection action. He argues, in essence, that poor eyesight is a defect that could have been waived by the Army, that he performed the required service, that the Government has not suffered in any way by his actions, and that, therefore, it would be unjust to rely on "technicalities" to collect from him.

DISCUSSION

A service member's entitlement to pay is dependent upon statutory right; accordingly, the rights of the affected member must be determined by reference to the governing statutes and regulations. Bell v. United States, 366 U.S. 393, 401 (1961); United States v. Larinoff, 431 U.S. 864, 869 (1977).

The flight pay and Aviation Career Incentive Pay received by the officer are authorized by 37 U.S.C. § 301 (1970) and 37 U.S.C. § 301a (1982), respectively,^{2/} subject to prescribed regulations. Both statutes provide for incentive pay in addition to basic pay for frequent and regular performance of flight duty required by orders provided certain other conditions are met. These conditions are

^{2/} Pub. Law 93-294, May 31, 1974, 88 Stat. 177, added section 301a to title 37, U.S. Code, providing Aviation Career Incentive Pay for officers who hold, or are in training for, an aeronautical rating or designation. Prior to the enactment of Pub. Law 93-294, such officers were entitled to incentive pay under 37 U.S.C. 301 for duty as a crew member participating in aerial flight (flight pay).

prescribed in Executive Orders Nos. 11157, as amended, and 11800, the Department of Defense Military Pay and Allowances Entitlements Manual and various service regulations. Only members who meet these requirements are entitled to the special pay for flying duty.

Among other conditions, such as minimum flying time requirements, an individual must meet certain medical fitness standards to qualify for flight training and flying duty. See Army Regulation 40-501, Chapter 4. If a member fraudulently qualifies for flight training and flying duty by misrepresenting his medical fitness, he does not meet the conditions as required by the authorizing statutes and regulations implementing those statutes. Therefore, he would not be entitled to flight pay or Aviation Career Incentive Pay under those statutes and regulations.

We have recognized, in certain instances, that members of the uniformed services may receive pay and allowances and other benefits incident to a de facto status. In one case an individual, when he enlisted in the service, fraudulently concealed the fact that he had used drugs which, if known, would have disqualified him for enlistment. He was discharged from the service based on his fraudulent enlistment but we held that he could retain the pay he had received prior to the discovery of the fraud. This was allowed by analogy to the de facto officer rule. Richard A. Johnson, B-179517, May 15, 1974. See also Leonard D. Ellison, B-185116, August 26, 1976; 44 Comp. Gen. 258 (1964); 41 Comp. Gen. 293 (1961).

We have noted, however, that an erroneous appointment to an office which may still qualify a person as an officer de facto differs from an assignment to flying duty. In the latter case there is no appointment to any office, but merely an assignment of additional or special duty to a member of the service. 23 Comp. Gen. 578, 581-582 (1944). Thus, we have held that there is no basis for the extension of the de facto rule to authorize retention of additional or special pay paid, when the individual had not complied with specific provisions of law or regulations necessary to qualify for such payments. 40 Comp. Gen. 642 (1961), and 23 Comp. Gen. 578, supra. See also 49 Comp. Gen. 51 (1969), and B-148716, June 22, 1962.

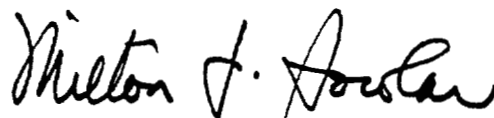
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While the officer in this case performed flying duties during the period in question, to be entitled to the special pay for such duty, he is required not merely to have been an Army officer, but also to have met the specific requirements of the laws and regulations. He did not meet those requirements because his orders to flight status were invalid having been obtained through fraud.

While we held in one case that an officer is entitled to flight pay, although failing to satisfy the regulatory requirement of taking an annual physical examination, 48 Comp. Gen. 81 (1968), that case is distinguishable from the facts here. In that case, entitlement to flight pay was based on the existence of competent orders and the failure to take prescribed steps to effect a suspension or termination of those orders. There was no allegation that the orders placing the individual involved in that case in a flight status were issued as a result of fraud. In the present case, from the beginning the officer's flying orders were based on fraudulent information. Therefore, they never could have been considered valid. See 41 Comp. Gen. 206 (1961).

Based on the information submitted, we agree with the Army's determination that the officer is not entitled to payments of flight pay and Aviation Career Incentive Pay he received from May 22, 1969, through November 13, 1982. Accordingly, appropriate collection action should be taken.

for 
Comptroller General
of the United States